

Drew (Migration) [2019] AATA 1113 (9 January 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Thomas Tobias Drew
CASE NUMBER:	1826518
DIBP REFERENCE(S):	BCC2014/1279342
MEMBER:	Justine Clarke
DATE:	9 January 2019
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 09 January 2019 at 12:26pm

1. CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – sponsorship withdrawn – relationship ceased – Tribunal attempted to contact applicant – no response – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65, 359, 360, 363

Migration Regulations 1994, r 1.09, Schedule 2, cl 801.221

CASES

Hasran v MIAC [2010] FCAFC 40

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 23 August 2018 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant, Mr Thomas Tobias Drew, is a 32 year old national of the United Kingdom.
4. On 23 May 2014, the applicant applied for the visa on the basis of his relationship with his sponsor, Ms Madison Jayde Wenske.
5. At the time of application, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. The primary criteria include cl.801.221 which essentially requires that, at the time of decision, the applicant is the spouse or de facto partner of the sponsoring partner, unless the relationship has ceased and/or certain circumstances exist.
6. The applicant provided the Tribunal with a copy of the primary decision. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221(1) of Schedule 2 to the Regulations because he did not meet cl.801.221(2), (2A), (3), (4), (5), (6) or (8). The primary decision states that:
 - On 11 July 2018, the sponsor informed the Department that her relationship with the applicant had ceased.
 - That same day, on 11 July 2018, the delegate emailed the applicant to provide the applicant with an opportunity to submit additional information concerning the change to his relationship status.
 - As at 23 August 2018 (the date of the Department's refusal decision), the Department had not received a response from the applicant.
7. On 11 September 2018, the applicant applied to the Tribunal for review of the primary decision. The applicant was unrepresented in this review.
8. On 4 December 2018, the Tribunal wrote to the applicant pursuant to s.359A of the Act, inviting him to comment or respond to information that it considered would be the reason, or a part of the reason, for affirming the decision under review. The information related to the withdrawal of sponsorship by the sponsoring partner. The invitation was sent to the applicant's email address which was the last address provided in connection with the review. The letter stated that, if the comments or response were not provided in writing by 18 December 2018 or an extension of time not sought by that time, the Tribunal may make a decision on the review without taking further steps to obtain the comments or response. The applicant was informed that, in such circumstances, he would lose any entitlement he might otherwise have had under the Act to appear before the Tribunal to give evidence and present arguments. Information about the loss of the right to a hearing was in bold type.
9. The applicant did not provide his comments or response within the prescribed period and no extension of time was sought nor granted. As at the time of this decision, the Tribunal has received no response at all.

10. In these circumstances, s.359C applies and pursuant to s.360(3), the review applicant is not entitled to appear before the Tribunal. The effect of s.363A of the Act is that, if a review applicant has no entitlement to a hearing, the Tribunal has no power to permit him or her to appear: *Hasran v MIAC* [2010] FCAFC 40. The Tribunal has decided to proceed to decision without taking further steps to obtain information such as inviting the applicant to an interview. The Tribunal has taken this course because of the applicant's limited engagement in this review.
11. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue before the Tribunal is whether, at the time of this decision, the applicant is a spouse or de facto partner of the sponsor.
13. Clause 801.221(2)(c) requires that, at the time of this decision, the applicant is the spouse or de facto partner of the sponsoring partner, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the Subclass 820 visa application as the spouse or de facto partner of the applicant.
14. 'De facto partner' is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
15. In forming an opinion whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

Are the parties in a de facto relationship?

16. As stated earlier, the applicant provided the Tribunal with a copy of the primary decision which indicates that the applicant sought the visa on the basis of his relationship with the sponsor but that in July 2018 the sponsor informed the Department that the relationship had ceased.
17. The primary decision places the applicant on notice that the ongoing nature of the relationship is at issue.
18. Since the primary decision was made on 23 August 2018, the applicant has presented no documentary evidence to show that he continues to be in a relationship with the sponsor.
19. At the time of this decision, there is no evidence before the Tribunal that the applicant and the sponsor:
 - share their finances, have joint liabilities or jointly contribute to expenses;
 - maintain a joint household or share housework—indeed, that they continue to live together or do not live separately and apart on a permanent basis;
 - continue to represent themselves to others as being in a relationship or that they socialise together; and

- draw companionship and support from each other or continue to have a mutual commitment to the relationship.

20. CONCLUSION

21. The Tribunal makes the following findings.
22. At the time of this decision, on the basis of the information and evidence before the Tribunal, the Tribunal is:
- satisfied that the applicant and the sponsor are not in a married relationship with each other for the purposes of s.5F of the Act;
 - satisfied that the applicant and the sponsor are not related by family for the purpose of s.5CB(2)(d) of the Act;
 - not satisfied that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others, as required by s.5CB(2)(a) of the Act;
 - not satisfied that the applicant and the sponsor have a genuine and continuing relationship, as required by s.5CB(2)(b) of the Act; and
 - not satisfied that the applicant and the sponsor live together, or do not live separately and apart on a permanent basis, as required by s.5CB(2)(c) of the Act.
23. Given these findings, the Tribunal is not satisfied that the requirements of s.5CB(2) are met at the time of this decision. In the circumstances, the Tribunal considers it unnecessary to consider whether the applicant meets the additional requirements for a de facto relationship in r.2.03A.
24. The Tribunal finds that the applicant does not meet cl.801.221(2)(c).
25. Further, the applicant has not claimed, and there is no evidence before the Tribunal, that he meets the alternative criteria in cl.801.221(2A), (3), (4), (5), (6) or (8).
26. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

27. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Justine Clarke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.

- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).